IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-39

WILLIAM PINKUS, doing business as "ROSSLYN NEWS COMPANY" and "KAMERA,"

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. _____

WILLIAM PINKUS,
doing business as
"Rosslyn News Company"
and "Kamera",

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case. That judgment affirmed petitioner's conviction in the District Court for the Central District of California on eleven counts of mailing obscene material in violation of 18 U.S.C. §1461.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is

reported at 551 F.2d 1155 (9th Cir. 1977), and is set forth in the Appendix, infra, p. 2a . No opinion was delivered in the District Court

JURISDICTION

The opinion of the Court of Appeals affirming petitioner's conviction was filed on April 7, 1977, and the judgment below was entered on that date. Appendix, infra, p. 2a . Petitioner filed a petition for rehearing with a suggestion for rehearing in banc on May 2, 1977. On June 6, 1977, the Court below denied the petition for rehearing and rejected the suggestion for rehearing in banc. Appendix, infra, p. 1a .

This petition seeks review of the judgment of a United States Court of Appeals in a criminal case. This Court has jurisdiction to grant this petition under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I.

In a federal prosecution for mailing allegedly obscene materials, where it was stipulated that the materials were not mailed to children, and that children were not involved in the case, did the District Court's jury instruction that children were to be considered as part of the community whose standards were to be applied in determining whether the materials were obscene contravene the First Amendment and constitute error?

II.

In a federal prosecution for mailing allegedly obscene materials, where there was no evidence that the materials were mailed to especially sensitive persons, did the District Court's jury instruction that sensitive persons were included in the community whose standards were to be applied in determining whether the materials were obscene contravene the First Amendment and constitute error?

III.

In a federal prosecution for mailing allegedly obscene materials, where the Court of Appeals, in reviewing petitioner's conviction, determined that two motion pictures offered as comparison evidence and excluded by the District Court bore a reasonable resemblance to the motion picture film which was the subject of one of several counts of the indictment, and where the record demonstrated massive public acceptance of the two films, (i) did the Court of Appeals err in refusing to review the exclusion of the comparison evidence in reliance upon the concurrent sentence doctrine; and (ii) where the defense adduced uncontradicted evidence that two motion pictures had received massive public acceptance within the community, and offered proof that these two films were comparable to the allegedly obscene materials, did the refusal of the District Court to permit the jury to review the films constitute error?

IV.

In a federal prosecution for mailing

allegedly obscene materials, where the record contained no evidence that the material was designed for or disseminated to any clearly defined deviant group, (i) did the District Court err in instructing the jury that it could consider the appeal of the material to the prurient interest of members of a deviant sexual group, and (ii) did the District Court err in instructing the jury that it could consider the appeal of such material to members of a deviant group without regard to whether the material was "designed for and primarily disseminated to a clearly defined deviant sexual group?"

V.

In a federal prosecution for mailing allegedly obscene materials, where there was no evidence as to the setting in which the materials were presented, or as to their manner of distribution, circumstances of production, sale or advertising, except the allegedly obscene ads and brochures themselves and the occupations of the recipients, did the Court below err (i) in instructing the jury that it could consider pandering in determining whether the materials were obscene, and (ii) in specifically instructing the jury that it could consider the setting in which the materials were presented including their manner of distribution, circumstances of production, sale or advertising?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment 1:

> Congress shall make no law...abridging

the freedom of speech, or of the press...."

18 U.S.C. §1461:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and
>
> "Every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and
>
> "Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and
>
> "Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the preventing or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and
>
> "Every paper, writing, advertisement, or representation that any article,

instrument, substance, drug, medicine, or thing may, or can, be used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and

"Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing--

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten

years, or both, for each such offense thereafter...."

STATEMENT OF THE CASE

On November 6, 1972, petitioner William Pinkus was indicted in the United States District Court for the Central District of California on eleven counts of mailing obscene material and advertisements in violation of 18 U.S.C. §1461.[1]

A jury trial held in July of 1973 resulted in petitioner's conviction which was reversed by the Court of Appeals for the Ninth Circuit on or about February 5, 1975.[2] The reversal of the prior conviction under this indictment was based

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1. T. 1-11. The record in the Court of Appeals below consisted of transcripts of the clerk's record and the reporter's record. References to the transcript of the clerk's record are herein designated by the prefix "T", and references to the reporter's transcript are designated by the prefix "R". Counts I, IV, V, VI, VII, IX, X and XI charged petitioner with mailing obscene brochures advertising films, books and magazines (and, in case of Count X, playing cards). Counts II, III and VIII charged him with mailing information where obscene material could be obtained. In addition, Count VII alleged the mailing of an obscene magazine and Count XI alleged the mailing of an obscene film. The dates of the alleged offenses ranged from July 28, 1971, to June 19, 1972.

2. United States v. Pinkus, 73-2900 (9th Cir. 1975).

upon the fact that the jury had been instructed under the expanded concept of obscenity announced in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607 (1973), although the alleged offenses occurred prior to that decision so that the more stringent Roth-Memoirs definition of obscenity was applicable. Cf. Marks v. United States, ____ U.S. ____, 97 S.Ct. 990 (1977).

Petitioner was retried before the same trial judge, generally under Roth-Memoirs precepts, in January of 1976; and a jury verdict of guilty on all eleven counts was rendered on January 12, 1976. On February 9, 1976, the Court sentenced William Pinkus to imprisonment for four years on each count, sentences to run concurrently [T. 356]. The Court also initially fined him an aggregate total of $11,000 (Ibid.), but upon noting that this fine was greater than that imposed following the first trial, the Court reduced the fine to $5,500 by entry dated March 1, 1976 (Ibid.).

Appellant filed his notice of appeal to the Court of Appeals for the Ninth Circuit on February 10, 1976.

The disposition of this case in the Court of Appeals is described in the Statement of Jurisdiction at p. 2, supra.

FACTS

The Government Case-in-Chief

The government's case-in-chief consisted solely of the introduction of

the allegedly obscene brochures and advertised or mailed obscene materials [Government Exhs. 1-11, R. 134-141], and the reading of a stipulation that the materials were voluntarily and intentionally mailed by the defendant with knowledge of the content and with the intention that the mailed materials be for the personal use of the recipient (Ibid.). 551 F.2d at 1157.

At close of the government's case, the government acknowledged that certain materials were presented as appealing to deviant groups [R. 147]. The defense called the attention of the Court to the lack of any independent evidence as to the deviant character of the materials (Ibid.), and moved for acquittal [R. 155-156, T. 177-180]. The motion was overruled [R. 164].

The Defense Case

The defense case consisted of expert and survey evidence tending to prove that the materials did not appeal to prurient interest, did not exceed community standards and had redeeming value. A survey of sexual attitudes was, in part, admitted [R. 218-258; 304-432; 469-513; Deft. Exhs. G, H & I]. 551 F.2d at 1157.

In support of the community acceptance of comparable materials, the defense called Whitney Williams, a representative of the entertainment newspaper, Daily Variety, who presented box office statistics for the popular films "Deep Throat" and "The Devil and Miss Jones" in the Los Angeles area [R. 285], indicating that at five dollars per admission, "Deep Throat"

grossed $2,672,476 during 1973 [R. 294, Deft. Exh. D] and additional large sums in 1974 [R. 295]; that "The Devil and Miss Jones" grossed $1,209,180 during 37 weeks in 1973-74 [R. 297, Deft. Exh. E]; and that these sexually explicit films were rated first and third on the list of the ten highest grossing films of the year in Los Angeles [R. 296-297]. At the $5.00 admission price, more than one-half million people attended exhibitions of "Deep Throat" in Los Angeles during 1973 alone, while more than 240,000 people purchased tickets for "the Devil and Miss Jones."

Although the trial judge had permitted the jury to hear the foregoing statistics concerning the public acceptance of "Deep Throat" and "The Devil and Miss Jones," he refused to allow the jury to see these motion pictures. Repeatedly during the trial the defense offered to exhibit these two films to the jury either in a theater [R. 170-172] or in the court room [R. 537-538], both for the benefit of the court and the jury on the issue of obscenity vel non and as comparison materials on the issue of contemporary community standards [R. 691].[3] The trial judge refused to permit these films to be admitted [T. 693] because he had viewed "part" of "Deep Throat" and felt "that it would not be proper for the films that have been offered to be shown to the jury." (Ibid.) There is no explication of why he came to this conclusion. See 551 F.2d at 1160-61.

The trial judge acknowledged that:

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3. Defense Exhibits K, L, M, N and O.

> "... in no way does [this case] involve any distribution of material of any kind to children, and that the evidence will, that there will be a stipulation even that there has been no exposure of any of this evidence to children." [R. 60].

Nevertheless, he permitted cross-examination of a defense witness on the effects of obscenity on children [R. 396-398].

Government Rebuttal

After the defense rested, over objection the government called a rebuttal witness, Dr. James Rue. Dr. Rue was a family counselor with minimal qualifications in sexual matters, whose doctorate was in telecommunications [R. 557-558; 569-570]. Over objection, Dr. Rue mentioned contact with "deviant sexual groupings" in his practice [R. 552] and was allowed to testify that certain aspects of the materials had appeal to "the average person in the community as well as sexually deviant groups." [R. 582-583].

This witness never did testify as to the effect of specific material on particular well-defined deviant groups, and there is utterly no record that the material was designed for or distributed to the members of any deviant group. Dr. Rue's testimony on the subject of deviance was merely that the diverse materials as a whole appealed to the prurient interest of the average person [R. 588] and, also, the prurient interest of a member of an unspecified sexually deviant group [R. 588-589].

Over objection the Court also permitted Dr. Rue to testify as to the adverse effect of obscene materials on the "young person" [R. 578].

In direct examination, Dr. Rue was asked whether he had any experience which would illustrate the effects of viewing similar material on the viewer. He replied that in a case "he was currently dealing with the father had molested his own daughter after having come from an adult book store...." [R. 579]. Petitioner immediately moved to strike and moved for a mistrial, but the motions were denied [R. 579].

The Jury Charge

Notwithstanding the stipulation that children were not involved in this case, the trial court refused to instruct the jury that the defendant was not charged "with having violated any law with regard to minor children" or that the jury should not "assume from the fact that there might have been testimony concerning minor children that the defendant is associated in any way with the issue concerning children." [T. 191, R. 662]. The judge refused all instructions tendered by petitioner which would have defined community standards in terms of what is accepted by the "average adult person" [T. 215; R. 678; R. 670-671].

Instead of excluding consideration of the special sensibilities of minors, the trial judge expressly adopted an instruction requested by the government [R. 243] and charged the jury that:

> "In determining community standards, you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men, women and children, from all walks of life." [R. 808]. (Emphasis added).

The district court also charged the jury that in determining the hypothetical average standard in the community, the jury must include the "sensitive," as well as the "insensitive"; that "in other words, you must include everyone in the community." [R. 807].

Despite the lack of sufficient testimony concerning the existence of any well-defined deviant group or groups for whom the material was designed or to whom it was distributed, the Court instructed the jury (over objection), that it must gauge whether the material when "considered in relation to the intended and probable recipients constituted an appeal to the prurient interest of the average person... or the prurient interest of members of a deviant sexual group" [R. 806] and that in applying the prurient interest test it must consider "how the picture would have impressed the average person, or a member of a deviant sexual group...." [R. 806-807].

The Court also instructed the jury at length, over objection, on pandering [R. 810-811]. The charge, in part, instructed the jury that in determining the obscenity of the materials, it could "consider the setting in which they are presented." [R. 810].

> "Examples of what you may consider in this regard are such things as: manner of distribution, circumstances of production, sale and advertising." (Ibid.).

Except for the brochures themselves, there was not a scintilla of evidence on any of these subjects.

The Decision of the Court of Appeals

The Court of Appeals found that the jury instruction on "sensitive persons" was "merely an elaboration on the concept of the total community." 551 F.2d at 1157-58.

While the Court acknowledged its preference that "children be excluded from the Court's instruction until the Supreme Court clearly indicates that inclusion is proper", it refused to reverse the conviction because of the inclusion of children in the instruction. Id. at 1158.

The Court below rejected petitioner's argument concerning the necessity of a foundation for an instruction on deviant appeal, holding that Mishkin v. New York, 383 U.S. 502 (1966) did not require a showing that the material was designed for and disseminated to a clearly defined deviant group. Id. at 1158-59.

Concerning the pandering charge the Court ruled, inter alia, that the mere fact that the occupations of the recipients were mentioned in the stipulation was a sufficient evidentiary foundation to support a charge that the jury could

consider the setting in which the materials are presented, including "manner of distribution, circumstances of production, sale and advertising", even though the record did not deal with these subjects at all. Id. at 1159-60.

The Court of Appeals dismissed as inconsequential improprieties concerning the inclusion of children into the case. Id. at 1160, 1161. Although the Court agreed with petitioner that the admission of the inflammatory testimony of the government rebuttal witness concerning a father molesting his daughter was "error" and that the motion to strike should have been granted, the Court held that reversal was not required and that the Court's denial of petitioner's motion for mistrial was proper. Id. at 1161-62.

The Court of Appeals also held that the comparable motion pictures offered by petitioner were reasonably similar to the film which was the subject of Count 9 of the indictment, but refused to complete its review of the assigned error concerning refusal to admit this evidence in reliance upon the concurrent sentence doctrine. Id. at 1161. The concurrent sentence doctrine had not been asserted by the government and was not briefed below, until petitioner applied unsuccessfully for rehearing in the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I.

Important questions concerning the definition of the community standard and

the average person in obscenity prosecutions are presented.

A. Children should not be included in the definition of the community.

At least two federal appellate courts have now upheld obscenity convictions based upon jury charges which have instructed the jury that in determining community standards, the community as a whole must be considered, including children. See the decision below, 551 F.2d at 1158; United States v. Manarite, 448 F.2d 583, 592 (2d Cir. 1971), cert. denied, 404 U.S. 947 (1971).

This type of jury charge appeared in the trial which culminated in Roth v. United States, 354 U.S. 493 (1957). However, the notion that this Court's affirmance of the obscenity conviction in Roth was an approval of that instruction was explicitly rejected in Ginzburg v. United States, 383 U.S. 463 (1966), as follows:

> "We are not, however, to be understood as approving all aspects of the trial judge's exegesis of Roth, for example his remarks that 'the community as a whole is the proper consideration. In this community, our society, we have children of all ages, psychotics, feeble-minded and other susceptible elements. Just as they cannot set the pace for the average adult reader's taste, they cannot be overlooked as part of the community.' 224 F.Supp. at 137. Compare Butler v. State of Michigan, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412."

Indeed, the concurring opinion of Judge Frank in the Court of Appeals for the Second Circuit, in Roth, had noted that the correct test is the effect of the material on "average normal adult persons...." United States v. Roth, 237 F.2d 796 (2d Cir. 1956 Frank, j. concurring), aff'd 354 U.S. 476 (1957). It seems clear that this Court's review of Roth was intended to fix the constitutional definition of obscenity, and not to affirm the jury charge.

In Butler v. Michigan, 352 U.S. 380 (1957), this Court considered the validity of a statute which punished distribution to the general public of material having a "potentially deleterious influence upon youth." Id., at 383. Striking down this statute, this Court held that:

> "We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society." Id., at 383-84. (Emphasis added).

To be sure, the charge in the instant case, like the charges in Roth and Manarite, supra, did not define obscenity solely in terms of what is fit for children, but included children as members of the community along with adults. Nevertheless,

the charge clearly has the effect, condemned in Butler, of reducing the level of the community standard below that of the average adult. If the standards applicable to children are to be given any weight in assessing materials distributed to adults, the composite average which results from the calculation will necessarily be below that of the average adult.

This charge also suffers from the vice of being unnecessarily confusing. As further discussed in connection with the "sensitive persons" charge at pp. 19-21, infra, it causes the jurors to attempt an impossible calculation of a hypothetical average person by toting up everyone in the community and computing a mean or median.

In Hamling v. United States, 418 U.S. 129, 94 S.Ct. 2887 (1974), the Supreme Court made it clear that the "average person" is a concept to be employed in a manner similar to the "reasonable person." See also United States v. Treatman, 524 F.2d 320 (8th Cir. 1975). It refers to "the average adult". Ibid. Most recently this Court reaffirmed that there is a "close analogy between the function of 'contemporary community standards' in obscenity cases and 'reasonableness' in other cases." Smith v. United States, ____ U.S. ____, 45 L.W. 4495, 4498 (May 23, 1977). Such a common sense approach suggests that the jurors should merely be instructed to apply the standard of an average normal adult in the community without engaging in the illusory task of calculating that average by some sort of mental survey of the entire community, most of whose members have never even made their standards known to the jurors.

The Court below bases its ruling on this point expressly on a "lack of authority against such an outcome." 551 F.2d at 1158. A writ of certiorari should be granted to supply that authority.[4]

B. "Sensitive persons" should not be included in the definition of the community.

In addition to including "children" as members of the relevant community whose standards were to be applied in assessing the materials for obscenity (see discussion at pp. 16-19, supra) the district court charged the jury that:

> "You are to judge these materials by the standard of the hypothetical average person in the community but in determining this average standard, you must include the sensitive and the insensitive, in other words, you must include everyone in the community." [R. 807] (Emphasis added).

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4. The inclusion of children in the definition of the community was compounded by other errors assigned in the Court of Appeals below. The district judge permitted government testimony on the adverse effect of pornography on children, refused to instruct that children were not involved in the case, and refused to strike government testimony concerning incestuous molestation of a child by an adult bookstore customer. See pp. 10-13, supra.

This instruction is hopelessly confusing for some of the reasons discussed in connection with the inclusion of children as members of the community. See pp. 18-19, supra. This instruction turns topsy-turvy the precept of Miller v. California that material "will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person - or indeed a totally insensitive one. See Roth v. United States, supra, 354 U.S. at 489, 77 S.Ct. at 1311." Miller v. California, 413 U.S. 33 (1973). The purport of this language quoted from the Miller opinion is to exclude from the jury's consideration the sensibilities of most and least sensitive persons. However, the thrust of the amplification of "average man" concept contained in the trial judge's charge here is to require the jury to include the sensibilities of "everyone" in the community in its deliberations before calculating the average level of sensitivity. Although jurors may have some common-sense notion of what an "average" attitude in the community might be, they do not know "everyone in the community," and cannot be expected intelligently to apply an equation which requires them to arrive at the median by reference to "everyone." The practical effect of this instruction is to require the jury to consider and include that which Miller and Roth both required them to ignore and exclude - the sensibilities of the most susceptible members of the community. As this Court recently said,

> "a principal concern in requiring that a judgment be made on the basis of 'contemporary community standards' is to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group." Hamling v. United States, 418 U.S. 87, 107 (1974).

By undermining that concern, the jury charge in this case was prejudicially erroneous.

In Smith v. United States, ____ U.S. ____, 45 L.W. 4495 (May 23, 1977), as well as Splawn v. California, ____ U.S. ____, 45 L.W. 4574 (June 6, 1977), this Court focused on the critical importance of proper jury instructions in obscenity cases. See particularly, Smith v. United States, ____ U.S. ____, 45 L.W. 4495, 4498 (May 24, 1977).

Certiorari should be granted to develope a clear and understandable definition of the community for use in jury instructions in federal obscenity prosecutions.

II.

Important questions concerning the viability of the concurrent sentence doctrine and the admissibility of comparison evidence in obscenity trials are presented by the decision of the Court below to refrain from reviewing the exclusion of such evidence by reason of the concurrent sentences imposed upon the petitioner.

A. The District Court's reliance upon the concurrent sentence doctrine constituted error and demonstrated a conflict among the circuit courts of appeal as to the application of the doctrine.

In Hamling v. United States, 418 U.S. 87, 125 (1974), this Court held that although mere availability of comparable materials on the newsstands does not make such materials admissible in an obscenity trial, "[t]he defendant in an obscenity prosecution, just as a defendant in any other prosecution, is entitled to an opportunity to adduce relevant, competent evidence, bearing on the issues to be tried." Ibid. Accordingly, petitioner laid an elaborate foundation concerning the massive public acceptance of a mere two films offered as comparison evidence. See Statement of Facts, pp. 9-10, supra.

The Court below concluded that the films would be admissible, under its holding in United States v. Jacobs, 433 F.2d 932, 933 (1970), if the defense were to demonstrate "(1) a reasonable resemblance between the proffered comparables and the allegedly obscene materials, and (2) a reasonable degree of community acceptance of the proferred comparables." 551 F.2d at 1160-61. The Court further found reasonable resemblance between the films proffered and the films in one of the counts of the indictment, but declined to complete its review of this issue because it found dissimilarity between the films and the brochures involved in the other counts, on which petitioner had been concurrently sentenced.

> "This circuit has adopted the concurrent sentence doctrine which, as enunciated by the Supreme Court in Benton v. Maryland, 395 U.S. 784, 791 (1969), ...is that a federal appellate court, as a matter of discretion, may decide that it is unnecessary to consider argument advanced by an appellant with regard to his conviction under one or more counts of an indictment, if he was at the same time validly convicted of other offenses under other counts and concurrent sentences were imposed." 551 F.2d at 1161.

This pronouncement utterly misreads and distorts the holding of Benton v. Maryland, 395 U.S. 784 (1969). In Benton this Court not only declined to apply the concurrent sentence doctrine on the facts before it, it also criticized and restricted the doctrine, noting that one "can search through these [the concurrent sentence] cases, and related ones, without finding any satisfactory explanation for the concurrent sentence doctrine." Id. at 789. This Court ruled that the doctrine is not jurisdictional (Id. at 790), and that "the existence of concurrent sentences does not remove the elements necessary to create a justiciable case or controversy." Ibid. It was acknowledged, in Benton, that "most criminal convictions do in fact entail adverse collateral legal consequences." Ibid. quoting from Sibron v. New York, 392 U.S. 40 (1968). Examples of adverse consequences mentioned in Benton included enhanced sentencing, use of

convictions for impeachment and the like. 395 U.S. at 790-91. In the Benton case, this Court declined to pass on whether the concurrent sentence doctrine even remains a discretionary principal of appellate review:

> "The concurrent sentence rule may have some continuing validity as a rule of judicial convenience. That is not a subject we must canvass today, however. It is sufficient for present purposes to hold that there is no jurisdictional bar to consideration of challenges to multiple convictions, even though concurrent sentences were imposed." Id. at 791. (Emphasis added).[5]

Following Benton, "[m]ost federal appellate courts that have been confronted with a concurring sentence situation... have refused to dismiss automatically an appeal from less than all counts and have similarly refused automatically to find it 'unnecessary' to review remaining counts after one has been examined and found valid." Note, The Federal Concurrent Sentence Doctrine, 70 Columbia L. Rev. 1099, 1109 (1970) (footnote deleted).

> "Arguably, a court's task is to determine whether significant collateral consequences may attend an unreviewed conviction or whether, if an appellant's claims are valid, an erroneous

5. Subsequent decisions of this Court suggest that the doctrine is discretionary for this Court's review on certiorari. Andresen v. Maryland, ___ U.S. ___, 96 S.Ct. 2737, 2739 n.4 (1975); Barnes v. United States, 412 U.S. 837, 848 n. 16 (1973).

> conviction on an as yet unreviewed count may have prejudiced the jury in its deliberations or may have influenced the judge in sentencing." Id., at 1109-1110.

In view of the Benton decision, some circuit courts of appeals have held that prejudice will be presumed, and all counts will be reviewed, unless a lack of prejudice is clearly shown.

> "Since we cannot say that there is no possibility of undesirable collateral consequences attendant upon these convictions, we choose to consider the validity of all the challenged counts." U.S. v. Tanner, 471 F.2d 128, 140 (7th Cir. 1972), cert. denied 409 U.S. 949 (1972); see also United States v. Febre, 425 F.2d 107, 113 (2d Cir. 1970), cert. denied 400 U.S. 849 (1971); United States v. Belt, 516 F.2d 873, 876 (8th Cir. 1975); cert. denied 423 U.S. 1056 (1976).

The cautious application of the concurrent sentence doctrine exemplified by the Febre and Tanner decisions directly conflicts with the application of that doctrine in the Ninth Circuit. As in the case at bar, the Court of Appeals for the Ninth Circuit has tended to invoke the doctrine routinely and without explanation of the criteria upon which it has relied. See, for example, United States v. Moore, 452 F.2d 576 (9th Cir. 1971); United States v. Hendricks, 456 F.2d 167, 179 (9th Cir. 1972); United States v. Ketola, 455 F.2d 83 (9th Cir. 1975); and United States v. Paduano, 549 F.2d 145 (9th Cir. 1977). An earlier decision of the Ninth Circuit which recognized that the mere possible

impairment of opportunity for pardon or parole justified review notwithstanding concurrent sentences seems to have been abandoned. See Clermont v. United States, 422 F.2d 1215, 1217 (9th Cir. 1970), cert. denied 402 U.S. 997 (1971). On at least one occasion, the Ninth Circuit has elected to review assigned error despite the availability of the concurrent sentence doctrine without explanation. See United States v. Murray, 492 F.2d 178 (9th Cir. 1973).

This Court should grant certiorari in order to answer the question left open in Benton, whether the concurrent sentence doctrine remains viable as a discretionary principal of appellate review, and if so, to describe the criteria upon which it should be applied. In so doing, this Court should end the inconsistency with which the doctrine is currently applied in the Ninth Circuit, and the direct conflict between the Ninth Circuit decisions and those of other jurisdictions.

The concurrent sentence doctrine operates with particular unfairness in the present case. In addition to the usual collateral effects incident to the worsening of a criminal record by an additional conviction, there is special prejudice shown to petitioner. It cannot be presumed that the jury, which found him guilty on all counts, kept clearly in mind the nice distinctions between the materials shown them under each separate count. It may well be that if a view of the offered comparison evidence had persuaded the jury that the film was not obscene, it

would have been less inclined to convict on the other counts as well. See Note, The Federal Concurrent Sentence Doctrine, 70 Columbia L. Rev. 1099, 1111 (1970).

Moreover, since much of the other materials at issue consisted of allegedly obscene advertising, and the film to which this Court found the comparison evidence relevant was one of the only examples before the jury as to the content of the product being advertised, the jury may well have been influenced in its appraisal of the ads by its assessment of the film.

Finally, the trial judge may have been influenced in the length of the concurrent sentences imposed by the fact that the jury found the defendant guilty on all counts. Cf. United States v. Yates, 355 U.S. 66 (1957) (remand for resentencing ordered where conviction on one of a number of counts was affirmed).

Under these circumstances, an application of the concurrent sentence doctrine without explicit consideration of the relevant factors was inappropriate. Accordingly, this case presents a particularly appropriate opportunity for review of the concurrent sentence doctrine on certiorari.

B. The District Court erred in excluding the comparison evidence.

If the Court of Appeals below had completed its review of the comparable films offered by the petitioner, it should have found that the District Court had erred in excluding them. This case presents an important question, left open in Hamling

v. United States, 418 U.S. 87 (1974), concerning the circumstances under which a trial court should admit such evidence.

In Hamling, this Court affirmed the refusal of a trial judge to permit the introduction of offered comparable materials. 418 U.S. at 124-25. However, the rejection of comparison evidence in that case was based on factors absent here. First, a "deluge" of materials was offered (id. at 125), whereas in the present case, only two films were offered.

Secondly, the basis, in Hamling, for the defense assertion that the materials had achieved public accptance was merely that some of them had received second-class mailing privileges, others had been found constitutionally protected in litigation, and some were openly available at newsstands. Ibid. This Court held that none of these factors militated in favor of their admission because neither the availability of the materials, nor mailing privileges, create any presumption that the comparable evidence was itself non-obscene (id. at 125-26); and that prior adjudications of nonobscenity do not make the material relevant as to the obscenity of other material. Id. at 126-27. To the contrary, in the present case, the public acceptance of the films was proven by their massive box office performance. See pp. 9-10, supra. And their relevance as to at least certain material in the trial was affirmatively found by the Court of Appeals below. See 551 F.2d at 1161. Accordingly, this case presents the questions whether the principles delineated in the state courts and the lower federal

appellate courts concerning the admission of such evidence are correctly stated, and whether those principles may be arbitrarily disregarded by the district courts.

The necessary foundation for the admission of comparable evidence has been held to consist of two elements: a showing of similarity of the materials and a showing of a "reasonable degree of community acceptance...." Womack v. United States, 294 F.2d 204 (D.C. Cir. 1961), cert. den. 365 U.S. 859, 81 S.Ct. 826 (1961); approved United States v. Womack, 509 F.2d 368, 375-376 (D.C. Cir. 1972), cert. den. 422 U.S. 1022 (1975); followed, United States v. Jacobs, 433 F.2d 932, 933 (9th Cir. 1970). State courts have held that where these elements are present a reasonable amount of non-repetitive materials should be admitted to shed "light on contemporary community standards." Woodruff v. State, 11 Md. App. 202, 220, 273 A.2d 436 (1971); State ex rel. Leis v. Williams S. Barton Co., Inc., 45 Ohio App. 2d 249, 263, 344 N.E.2d 342 (1975); Pierce v. State, 296 S.2d 218, 277 (Ala. 1974), cert. denied 419 U.S. 1130 (1975); see also In re Harris, 16 Cal. Rptr. 889, 366 P.2d 305 (1961).

Review of this case on certiorari is required to establish that the admittedly broad discretion of trial courts to admit or reject evidence is not absolute, and that this Court's decision in Hamling should not be construed as authorizing arbitrary exclusion of offered relevant comparison evidence.

III.

This case presents important questions concerning the prerequisites for a jury charge on prurient appeal to deviant sexual groups.

Petitioner urged as error in the Court of Appeals below, the instruction to the jury that it must gauge whether the material when "considered in relation to the intended and probable recipients constituted an appeal to the prurient interest of the average person...or the prurient interest of members of a deviant sexual group" [R. 806], and that in applying the prurient interest test the jury must consider "how the picture would have impressed the average person, or a member of a deviant sexual group...." [R. 806-807]. See 551 F.2d 1158. Petitioner argued that (i) there was insufficient evidence of prurient appeal to members of sexually deviant groups to sustain any jury charge on the subject; and (ii) that the charge as given was erroneous in that it failed to require the jurors to consider whether the material was "designed for and primarily disseminated to a clearly defined sexual group." Petitioner relied, for these propositions, on the opinion of this Court in Mishkin v. New York, 383 U.S. 501 (1966), which stated, in part:

> "Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the dominant

> theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. The reference to the 'average' or 'normal' person in Roth, 354 U.S. at 489-490, 77 S.Ct., at 1311, does not foreclose this holding. In regard to the prurient-appeal requirement, the concept of the 'average' or 'normal' person was employed in Roth to serve the essentially negative purpose of expressing our rejection of that aspect of the Hicklin test, Regina v. Hicklin (1868) L.R. 3 Q.B. 360, that made the impact on the most susceptible person determinative. We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group; and since our holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons, it also avoids the inadequacy of the most-susceptible-person facet of the Hicklin test." 383 U.S. at 508-509, 86 S.Ct. at 963-964 (Emphasis added).

In dismissing petitioner's contentions on this subject, the Court of Appeals conceded that "[s]ome support for petitioner's position may be found in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 n. 6 (1973). 551 F.2d at 1158-59 n.7. However,

the Court below held that (i) the Mishkin opinion did not establish design of or dissemination to a deviant group as a prerequisite to a deviant appeal charge, (ii) sufficiently specific definition of the deviant groups involved was supplied by the government's rebuttal witness, and (iii) the deviant appeal instruction was supported by Hamling v. United States, 418 U.S. 129 (1974). Id. at 1158-59. These conclusions were each erroneous.

The government's rebuttal testimony hardly constitutes a specific definition of deviant groups. The rebuttal witness did not define or describe the groups but, in the words of the Court below, merely said that the materials appealed to "the prurient interest of homosexuals, sado-masochists and those interested in group sex." Id. at 1158-59 n. 7. Interestingly, this witness testified that the same material had prurient appeal to both average and deviant persons [R. 588-89]. However, irrespective of the sufficiency of that testimony to supply evidence of clearly defined groups, there was no evidence that the material was designed for or disseminated to any such groups. Moreover, the jury instructions omitted any reference to either the requirement that the deviant groups be clearly defined or that the materials be designed for or disseminated to such groups.

In Hamling v. United States, 418 U.S. 87 (1974), this Court did not purport to retreat from its exposition of the principles governing bizarre materials in Mishkin v. New York, 383 U.S. 501 (1966). The issue considered in Hamling was whether

the jurors could consider whether some portions of a work appealed to "a prurient interest of a specifically defined deviant group as well as whether they appealed to the prurient interest of the average person." 418 U.S. at 128. In Hamling, as in Mishkin, there was ample evidence of circumstances of production and massive distribution from which some inference could be drawn as to the design and dissemination of deviant materials to an "intended and probable recipient group." Mishkin v. New York, 383 U.S. 502 (1966), quoted in Hamling v. United States, 418 U.S. at 129. The Hamling opinion fully restated the language in Mishkin referring to material "designed for and primarily disseminated to a clearly defined deviant group." Id. at 129. In the instant case, not only was evidence on this subject totally lacking, but the jury was not even instructed to consider the design and pattern of dissemination of the materials.

By construing the language in Mishkin, quoted in Hamling, as mere surplusage and truncating the prerequisites for submitting the issue of deviant sexual appeal to the jury, the Court below has departed from the standards set down by this Court in a manner which calls for review upon certiorari.

IV.

This case presents important questions concerning the submission of pandering charges to a jury.

Two issues are presented by the pandering instruction given to the jury in the district

court and affirmed by the decision below. First, the record contained insufficient evidence of pandering to support any charge on this subject whatever. Secondly, even if some pandering charge was justified by the record, the instruction as given included specific reference to contextual matters upon which there was no evidence whatever.

A. There was insufficient evidence to support any charge of pandering.

The trial in this case was based upon the materials themselves and a stipulation that they were intentionally mailed by the defendant for the personal use of the several designated recipients. See 551 F.2d at 1157. The lack of any evidence concerning the context of the mailings rendered it improper for the district court to instruct the jury on pandering in any manner whatever.

In both Ginzburg v. United States, 383 U.S. 463 (1966), and Mishkin v. New York, 383 U.S. 502 (1966), the cases which announced the principle that pandering can be considered in assessing the obscenity of materials, there was "abundant evidence to show that each of the publications was originated or sold as stock in trade of the sordid business of pandering...." Ginzburg v. United States, 383 U.S. at 467. This evidence included testimony on the defendant's methods of operation, volume of mailings, scope of public solicitation and the like. Ibid., Cf. Mishkin, 383 U.S. at 505-506.

Similarly, in Hamling v. United States, 418 U.S. 87 (1974), which approved a pandering instruction and reaffirmed the principles of Mishkin and Ginzburg (see 418 U.S. at 130), there was extensive evidence of the extent and methods of distribution of the Illustrated Report and brochure and detail concerning the economics of the publication. Id. at 92-96. The brochure itself contained substantial text from which editorial intent could be gleaned. Id. at 93-94. In sharp contrast, the trial below produced no evidence of any kind on these subjects. While certain of the materials were ads or brochures, the government's case falls far short of that which supported the application of the pandering doctrine in Ginzburg, Mishkin and Hamling. Nevertheless, the trial court instructed the jury along the lines of the pandering instruction in Hamling:

> "Having covered the three elements of obscenity, there is one additional matter that you may consider, and that is the matter of pandering. You must make the decision whether the materials are obscene under the test I have given you. In making this determination you are not limited to the materials themselves. In addition, you may consider the setting in which they are presented. Examples of what you may consider in this regard are such things as: manner of distribution, circumstances of production, sale and advertising. The editorial intent is also relevant.

> What you are determining here is whether the materials were produced and sold as stock in trade of the business of pandering. Pandering is the business of purveying textual or graphic matter openly advertised to appeal to erotic interest of the customer." 551 F.2d at 1159.

While the general relevance and appropriateness of this type of instruction was again upheld in Splawn v. California, ____ U.S. ____, 45 L.W. 4574, 4575 (June 6, 1977), that decision did not consider whether such an instruction is appropriate where the record is devoid of any facts concerning the context of publication and distribution. In Splawn this Court noted that its "authority to review jury instructions is a good deal broader" where the prosecution is "under federal obscenity statutes...." Ibid. This case is thus a timely vehicle for the establishment of the principle that pandering instructions cannot be routinely introduced in all obscenity prosecutions irrespective of the paucity of the record.

Earlier decisions of the Ninth Circuit Court of Appeals refused to permit convictions under the pandering doctrine in the absence of substantial evidence on the subject. See United States v. Baranov, 418 F.2d 1051, 1053 (9th Cir. 1969); Grant v. United States, 380 F.2d 748 (9th Cir. 1967). The instant case represents a significant departure from that principle which should be nipped in the bud.

The pandering doctrine as formulated in Ginzburg v. United States was a narrow holding that "in close cases, evidence of pandering may be probative with respect to the nature of the material...." 383 U.S. at 474. As discussed above, the application of the doctrine in Ginzburg and Mishkin was based upon substantial evidence of the context of the distribution from which pandering could be regarded as proven. This Court's decisions in Hamling and Splawn have now reaffirmed its earlier holdings concerning the relevance of evidence of pandering. However, as demonstrated by the decisions below in this case, it is now necessary for this Court to reaffirm that the conditions upon which the Ginzburg and Mishkin holdings were based remain in effect, and that substantial evidence of pandering is a precondition to the injection of pandering as an issue in an obscenity trial.

B. The charge on pandering invited the jury to consider matters not in evidence.

Even if the jury might have been entitled to consider the content of the brochures or advertisements under a pandering charge (which petitioner denies), the charge in this case went far beyond that content. The trial judge instructed the jurors that they could consider the "setting" in which the materials are presented, including "manner of distribution, circumstances of production, sale and advertising." [R. 810]. There was no evidence whatever on manner of distribution, sale or advertising of the materials other than the bald stipulation that they were mailed for the personal use of the recipient. And there

was no evidence whatever concerning circumstances of production. Accordingly, this instruction invited the jury to consider matters not in evidence.

The Court of Appeals below approved the charge on the basis that the items enumerated by the trial judge were only examples, and that because the occupations of the recipients were known to the jurors, they could infer that distribution was not to a particular professional group. 551 F.2d at 1160. However, the occupations of the recipients could supply no inference whatever as to the circumstances of production, sale or advertising, nor any of the sort of detail concerning manner of distribution which has been present in other cases where this Court has approved of pandering charges.

The critical importance of the pandering instruction is unmistakably evident from the fact that the jury specifically asked for a rereading of that instruction after it had retired to deliberate [R. 821]. In fact, this request was the only question submitted by the jury during its deliberations. Thus the objectionable language quoted above was repeated to it a second time, and received additional emphasis.

This Court has held that it is error to give even a correct charge on facts which are not in evidence.

> "It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered. The instruction

> presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjecture, instead of weighing the testimony." United States v. Breitling, 20 How. 252, 254-55, 61 U.S. 252, 254-55 (1858).

The lack of evidence on the specific matters upon which the trial judge invited the jurors to speculate is sufficient cause for reversal.

* * *

The Court below confirmed, but condoned, the existence of numerous improprieties in the trial of this case. It disapproved of an instruction including children in the community for purposes of assessing community standards. 551 F.2d at 1158. It concurred that there was error in overruling the motion to strike inflammatory testimony of a government witness. Id. at 1161-62. It conceded that permitting cross-examination of a defense witness on the effect of pornography on children might have been erroneous, (Id., at 1160), and its threshold review of the exclusion of defense comparison evidence pointed toward error. 551 F.2d at 1161. The affirmance of petitioner's conviction in

the face of these multiple irregularities can best be explained by the Court's conclusion that "[t]he evidence of obscenity was...overwhelming...." (Id. at 1160), and its inference that petitioner had commercially exploited the materials. Id., at 1159-60.

In the context of these multiple procedural and evidentiary abuses, the review of this case on certiorari assumes an importance which transcends each error considered separately. The mass of obscenity litigation pending in the state and federal courts must inevitably foster a dangerous judicial temptation, exemplified by the affirmance in this case, to sustain a conviction irrespective of all attendant irregularities of procedure and evidence whenever the Court perceives that the defendant is a pornographer and the materials are obscene.

In Roth v. United States, 354 U.S. 476 (1957), this Court held that "obscenity is not within the area of constitutionally protected speech or press." Id. at 485. This exception carved from the constitutional immunity generally accorded expression was retained in Miller v. California, 413 U.S. 15, 23 (1973). The notion that pornographic materials are not entitled to even a "modicum" of protection against criminal sanctions has been questioned. See, for example, Smith v. United States, 45 L.W. 4495, 4500 (May 23, 1977, Stevens, J. dissenting). However, it has never been suggested that the process of differentiating protected from unprotected is less entitled to fairness and precision than other determinations under criminal procedure. To the contrary, the majority opinion in

Miller noted the necessity of reliance upon the "rules of evidence, presumption of innocence, and other protective sections..." in "resolving the inevitably sensitive questions of fact and law...." Id. at 26.

A proper regard for the chilling effect of obscenity prosecutions, as well as the fundamental fairness essential to all criminal trials, requires that special care be exercised by the appellate courts to assure that the prosecution of distributors of materials claiming First Amendment protection is conducted with every regard for proper procedure. Such care was utterly lacking in the judicial treatment of petitioner.

Certiorari should be granted for the purpose of emphasizing that even a defendant accused of being a pornographer is entitled to a fair trial.

CONCLUSION

For the foregoing reasons, petitioner respectfully urges this Court to grant the writ of certiorari and accept this case for review.

Respectfully submitted,

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APPENDIX

(filed June 6, 1977)
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 76-1393
Plaintiff-Appellee,	)	
v.	)	
WILLIAM PINKUS, doing business as "Rosslyn News Company" and "Kamera",	)	ORDER
Defendant-Appellant.	)	

Before: WRIGHT and WALLACE, Circuit Judges, and ORRICK, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Wright Wallace have voted to reject the en banc suggestion.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

DATED:

(filed April 7, 1977)
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 76-1393
Plaintiff-Appellee,	)	
v.	)	
WILLIAM PINKUS, doing business as "Rosslyn News Company" and "Kamera",	)	OPINION
Defendant-Appellant.	)	

Appeal from the United States
District Court for the Central
District of California

Before: WRIGHT and WALLACE, Circuit Judges, and ORRICK, District Judge.*

WRIGHT, Circuit Judge:

On this appeal from a conviction on 11 counts of mailing obscene material[1] in violation of 18 U.S.C. §1461 (1970),[2] we are presented with nine claims of error, of which several require extended

*Of the Northern District of California; Honorable William H. Orrick, District Judge, sitting by designation.

consideration. They direct our attention to the adequacy and propriety of the jury instructions and the trial court's refusal to admit in evidence for jury viewing two full length motion pictures which are said to be box office successes, if not smash hits, at least with some audiences. We conclude that the trial was fairly conducted, without reversible error, and the judgment and sentence must be affirmed.

At trial, the government's case-in-chief consisted of the introduction of the obscene materials and the reading of a stipulation that they were voluntarily and intentionally mailed by the appellant with knowledge of the content and with the intention that they be for the personal use of the recipient. It was also stipulated that none had been mailed to children.

The defense introduced expert and survey evidence to prove that the materials did not appeal to prurient interests or exceed community standards, and that they had redeeming social value.[3] In rebuttal, the government called a family counseler who testified, among other things, that the materials had prurient appeal to the average person in the community as well as to sexually deviant groups.

I.

JURY INSTRUCTIONS

Appellant challenges four portions of the jury instructions and contends, as a fifth claim of error, that the court erred in refusing a requested instruction.

We consider first whether there was reversible error in any instruction.

A. Sensitive Persons.

The court instructed the jury:[4]

> Thus the brochures, magazines and film are not to be judged on the basis of your personal opinion. Nor are they to be judged by their effect on a particularly sensitive or insensitive person or group in the community. You are to judge these materials by the standard of the hypothetical average person in the community, but in determining this average standard you must include the sensitive and the insensitive, in other words, you must include everyone in the community.

Appellant contends that, by including the sensitive and the insensitive in determining the standard of the hypothetical average person in the community, the jury would not be adhering to the precept in Miller v. California, 413 U.S. 13, 33 (1973), that the material "be judged by its impact on the average person, rather than a particularly susceptible or sensitive person--or indeed a totally insensitive one," and therefore the instruction was erroneous.

We disagree. The Supreme Court has frequently held that jury instructions are to be judged as a whole, rather than by picking isolated phrases from them. Boyd v. United States, 271 U.S. 104, 107 (1926);

Hamling v. United States, 418 U.S. 87, 107-108 (1974); see also Unites States v. Moore, 522 F.2d 1068, 1079 (9th Cir. 1975), cert. denied, 423 U.S. 1049 (1976). The judge's reference here to the sensitive and the insensitive was merely an elaboration on the concept of the total community.

The trial judge specifically said that the hypothetical average person standard was to be used and that the materials were not to be judged by their effect on a particularly sensitive person. The instructions were not inconsistent with Miller v. California, supra.

B. Children in the Community.

Another challenged portion of the instructions stated:[5]

> In determining community standards, you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men and women and children, from all walks of life.

Appellant objects to the word children in the court's definition of community. Although we note that the Second Circuit has upheld a virtually identical instruction in United States v. Manarite, 448 F.2d 583, 592 (2d Cir.), cert. denied, 404 US.. 947 (1971), we find no reversible error here, not because of the outcome in Manarite, but because of the lack of authority against such an outcome. We do not imply that we approve this language. Rather, we feel that the specific inclusion

of children is unnecessary in the definition of the community and prefer that children be excluded from the court's instruction until the Supreme Court clearly indicates that inclusion is proper.

At present, the Supreme Court has both upheld a conviction involving the inclusion of children in the community [see Roth v. United States, 354 U.S. 476, 490 (1957)] and intimated that it does not necessarily approve such a charge. See Ginzburg v. United States, 383 U.S. 463, 465 n.3 (1966). Although the Court has emphasized that the jury is to ascertain the sense of the "average person, applying contemporary community standards" when deciding the obscenity question [see Hamling v. United States, 418 U.S. 87, 105 (1974)], it has not defined the term community in other than a geographical sense.

The instruction in this case did not, as appellant contends, result in reducing the adult population of the Central Judicial District of California to reading what is fit only for children. Compare Butler v. Michigan, 352 U.S. 380 (1957). The entire community was explicitly made the appropriate standard for consideration. The error, if any, does not require reversal.

C. Deviant Sexual Groups.

Relying on Mishkin v. New York, 383 U.S. 502 (1966), appellant next challenges that portion of the instruction which reads:[6/]

> In applying this test, the question involved is not how the picture now impresses the individual juror, but rather, considering the intended and probable recipients, how the picture would have impressed the average person, or a member of a deviant sexual group at the time they received the picture.

He interprets Mishkin to hold that a deviant-appeal instruction cannot be given unless there is sufficient evidence to establish that the material was designed and disseminated to a deviant group, as well as evidence which clearly defines that group and shows that it was involved in some way this these materials. Although Mishkin stated that Roth did not foreclose a finding of obscenity when the foregoing was proved, it did not hold that such evidence was a prerequisite to such a charge.

The only requirement imposed along the lines appellant suggests was that "the recipient group be defined with more specificity that in terms of sexually immature persons." Id. at 509. This requirement was met by the testimony of the government rebuttal witness.[7/]

Our case is similar to Hamling v. United States, supra, where the district court instructed as to the prurient interest of deviant groups even though there was no evidence as to specific deviant appeal. The court of appeals found no error, stating that it was

"'manifest that the District Court considered that some of the portrayals in the Brochure might be found to have a prurient appeal' to a deviant group." Id. at 128. The Supreme Court affirmed. That reasoning is applicable here. See also, United States v. Hill, 500 F.2d 733 (5th Cir. 1974), cert. denied, 420 U.S. 952 (1975).

D. Pandering.

The trial judge also instructed the jury on pandering, stating:[8]

> Having covered the three elements of obscenity, there is one additional matter that you may consider, and that is the matter of pandering. You must make the decision whether the materials are obscene under the test I have given you. In making this determination you are not limited to the materials themselves. In addition, you may consider the setting in which they are presented. Examples of what you may consider in this regard are such things as: manner of distribution, circumstances of production, sale and advertising. The editorial intent is also relevant. What you are determining here is whether the materials were produced and sold as stock in trade of the business of pandering. Pandering is the business of purveying textual or graphic matter openly advertised to appeal to erotic interest of the customer.

Appellant contends that there was insufficient evidence to support a charge of pandering and that in any event the charge invited the jury to consider matters not in evidence, such as manner of distribution and circumstances of production (the stipulation stating only that the materials had been intended and mailed for personal use).

Appellant relies on United States v. Baranov, 418 F.2d 1051 (9th Cir. 1969), for the proposition that mere proof of mailing does not support a pandering charge. See also Redrup v. New York, 386 U.S. 767 (1967).

United States v. Pellegrino, 467 F.2d 41 (9th Cir. 1972), provides a good framework for analyzing whether there is evidence of pandering in a case where the charged materials, not stipulated to be nonobscene as in Baranov, are available for examination. In Pellegrino we noted that the question of pandering is not wholly irrelevant in the case of advertising; that mass mailings can be consistent with a nonobscene publication as well as with an obscene one; and that the text of the material is not to be ignored in determining whether there is "commercial exploitation of erotica solely for the sake of their prurient appeal. 383 U.S. at 466." Pellegrino, 467 F.2d at 45-46.

In Pellegrino, the brochure contained chaste and self-serving disclaimers of obscene theme which were not transparently spurious. The persistent theme of the brochure was that the book it advertised was worth buying because it imparted

knowledge and understanding of materials of importance to all adults. Id. at 46. Our review of the exhibits in this case makes it clear that we have here quite a different situation. In fact, many elements of pandering identified in Ginzburg v. United States, 383 U.S. 463 (1966), are present.

In identifying pandering, the Court in Ginzburg noted that the "leer of the sensualist" permeated the advertising, the solicitation was indiscriminate and not limited to those who might independently discern the material's therapeutic worth, the petitioner deliberately represented his materials as erotically arousing, and such representations tended to force public confrontation with potentially offensive aspects of the work. 383 U.S. at 486-70.

In this case, although the mailing location was not chosen for its impact value as in Ginzburg, all other elements noted above that the Court found determinative of pandering were present. We find, therefore, that there was sufficient information in the stipulation and the materials themselves to support a pandering charge.

As to the charge itself, we find no error in the mention of manner of distribution and methods of production as examples of what the jurors could consider in addition to the materials themselves. Although the stipulation did not detail appellant's method of operation in terms of how the recipients were chosen and what the precise method of production was, it did contain information such as the

occupation of the recipients, from which the jury could infer that no particular professional group was singled out for distribution. The charge did not instruct the jury to consider matters not in evidence.

As a fifth allegation of error, appellant contends that it was error for the court to refuse to instruct the jury that minor children were not involved in the case. We find no error. It was clear from the stipulation that children were not involved and that none had been recipients of the mailed materials. Additionally, the jurors were told during voir dire that no children were involved. We do not find other alleged improprieties concerning the intrusion of children into the case sufficient to make the ruling erroneous.

II.

EVIDENTIARY RULINGS

A. Cross-examination.

Appellant contends that the court erred in allowing cross-examination of a defense witness on the possible deleterious influence of the materials on young children.

As the Court recently stated in United States v. Hamling, 418 U.S. at 124-25:

> Petitioners have very much the laboring oar in showing that such rulings constitute reversible error, since "in judicial

> trials, the whole tendency is to leave rulings as to the illuminating relevance of testimony largely to the discretion of the trial court that hears the evidence." NLRB v. Donnelly Co., 330 U.S. 219, 236 (1947). . . .

We conclude that any error was harmless. The total testimony as to the effect of the materials on young children was only three or four pages in a transcript of more than 600 pages. The evidence of obscenity was so overwhelming that this bit of testimony provides no basis for reversible error.

B. Comparable Materials.

The appellant also challenges the judge's ruling that the jury would not be allowed to view the allegedly comparable films of "Deep Throat" and "The Devil in Miss Jones."

Preliminarily we note that the trial judge did not indicate specifically his ground for refusing admission of the evidence. Initially he ruled that no proper basis had been established[9] and later he stated that the movies were not "proper" for the jury to see.[10]

Although this makes review more difficult, it is well-settled that "if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." Helvering v. Gowran, 302 U.S. 238, 245 (1937). We shall consider the applicable law to determine if there is

any ground upon which the evidence could properly have been refused.

"The defendant in an obscenity prosecution, just as a defendant in any other prosecution, is entitled to an opportunity to adduce relevant, competent evidence bearing on the issues to be tried." Hamling v. United States, 418 U.S. at 125. In this circuit, however, for the films to be admissible as comparable and probative of community standards the burden is on the defendant to demonstrate two prerequisites: (1) a reasonable resemblance between the proffered comparables and the allegedly obscene materials, and (2) a reasonable degree of community acceptance of the proffered comparables. United States v. Jacobs, 433 F.2d 932, 933 (9th Cir. 1970).

We have viewed the two allegedly comparable films as well as all the other exhibits in this case. We conclude that "Deep Throat" and "The Devil in Miss Jones" bore a reasonable resemblance to the film "No. 613" identified in count 9 of the indictment, but not to the other materials identified in the other 10 counts.

The three films were similar because they presented the same or similar sexual acts with an equal degree of explicitness. Thus the first prong of the Jacobs test was met as to them. The brochures and magazine, however, were of a different medium, and as one court has noted "slight variations in format" may produce "vastly different consequences in obscenity determinations." United States v. Womack, 509 F.2d 368, 378 (D.C. Cir. 1974), cert.

denied, 422 U.S. 1022 (1975). Moreover, the brochures advertised materials pertaining to homosexuality and sadobondage. These subjects were not portrayed in the two proffered films. As to the brochures and the rest of the exhibits, exclusive of film "No. 613", we find that the first prong of Jacobs was not met and the trial judge committed no error in exercising his discretion to deny the offer of the two films into evidence.

This circuit has adopted the concurrent sentence doctrine which, as enunciated by the Supreme Court in Benton v. Maryland, 395 U.S. 784, 791 (1969), is that a federal appellate court, as a matter of discretion, may decide that it is unnecessary to consider arguments advanced by an appellant with regard to his conviction under one or more counts of an indictment, if he was at the same time validly convicted of other offenses under other counts and concurrent sentences were imposed. United States v. Moore, 452 F.2d 576, 577 (9th Cir. 1971); United States v. Paduano, ___ F.2d _____ (9th Cir. Jan. 25, 1977) (slip op. at 6); United States v. Ratcliffe, ___F.2d _____ (9th Cir. Dec. 16, 1976) (slip op. at 3).

Pinkus was sentenced to four years on each of the eleven counts, the sentences to run concurrently. We therefore decline to examine the question whether he demonstrated sufficient community acceptance of the comparable films to warrant our finding that the trial judge erred in excluding the evidence with respect to count 9.

III.

DEFENSE MOTIONS

A. Motion for Acquittal.

Appellant contends that the court erred in denying his motion for acquittal at the end of the government's case. The basis for the motion was that the government failed to introduce expert testimony to support a claim of deviant appeal. As discussed in Part I, supra, appellant's cases do not support his contention. Mishkin and Hamling allow us to conclude that the materials speak for themselves on this matter.

B. Motions to Strike and for Mistrial.

Appellant also moved to strike and for a mistrial in response to the following testimony of the government rebuttal witness: "In the case that I'm currently dealing with the father molested his own daughter after having come from an adult book store."[11] Both motions were denied.

Because no foundation had been laid to connect the materials viewed by the father with those at issue in this case, we agree with the appellant that this was a situation "where the minute peg of relevance [was] entirely obscured by the dirty linen hung upon it." Lucero v. Donovan, 354 F.2d 16, 22 n.7 (9th Cir. 1966). The error in denying the motion to strike, however, is not so severe, when viewing the entire case, as to require reversal. Denying the motion for mistrial was proper.

The decision of the district court is AFFIRMED.

F O O T N O T E S

1/ The indictment recited that Pinkus had mailed obscene illustrated brochures advertising sex films, books, magazines and playing cards; the magazine "Bedplay"; and an 8 mm. film, "No. 613," to addressees in Nevada, New York, Iowa, Pennsylvania, Texas and New Jersey.

2/ Title 18 U.S.C. § 1461 provides in pertinent part:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and --
>
> "Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made. . . .
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> "Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section 3001(e) of Title 39 to be non-mailable, or knowingly causes

to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter. . . ."

3/ In the conviction appealed from, the Roth-Memoirs standard for determining obscenity was used. See Roth v. United States, 354 U.S. 476 (1957) and Memoirs v. Massachusetts, 383 U.S. 413 (1966). The Memoirs Court restated the Roth test in the following manner:

> "as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

383 U.S. at 418.

4/ Reporter's Transcript at 807.

5/ Reporter's Transcript at 808.

6/ Reporter's Transcript at 806-07.

7/ The witness testified that there was appeal in the materials to the prurient interests of homosexuals, sado-masochists and those interested in group sex.

Some support for appellant's position may be found in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 n.6 (1973), where the Court, in discussing that obscene materials speak for themselves and no expert affirmative evidence is necessary when the materials are actually placed in evidence, qualified its duscussion by noting: "We reserve judgment, however, on the extreme case, not presented here, [group sex, fellatio, and cunnilingus were present in that case] where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest." But see discussion of Hamling in text, infra.

8/ Reporter's Transcript at 810.

9/ Reporter's Transcript at 171.

10/ Reporter's Transcript at 693.

11/ Reporter's Transcript at 579.